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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
11

12 KEITH MOORE,

13 Plaintiff,

14 v.

15 SHERIFF LEE BACA, et al.,

16 Defendants.
17

No. CV 10-4033-DDP (PLA)

ORDER DISMISSING CASE WITHOUT
PREJUDICE FOR FAILURE TO
PROSECUTE

18 I.

19 PROCEEDINGS

20 On March 18, 2010, after the matter was transferred from the United States District Court
21 for the Eastern District of California, plaintiff lodged with this Court a Complaint in Case No. 10-
22 1995-UA (PLA). Plaintiff's request to proceed in forma pauperis in that action was denied by Chief
23 Judge Audrey B. Collins on March 26, 2010. (See Order entered April 1, 2010, in Case No. 10-
24 1995-UA (PLA)). On June 7, 2010, plaintiff filed the instant Complaint with the Court. As plaintiff
25 again requested leave to proceed in forma pauperis, the Court screened the Complaint for the
26 purpose of determining whether the action was frivolous or malicious; or failed to state a claim on
27 which relief may be granted; or sought monetary relief against a defendant who is immune from
28 such relief. See 28 U.S.C. § 1915(e)(2).

1 On June 8, 2010, the Magistrate Judge issued an Order to Show Cause Re Expiration of
2 Statute of Limitations, ordering plaintiff to show cause, no later than June 29, 2010, why this action
3 should not be dismissed for failure to meet the applicable statute of limitations. Specifically, the
4 Magistrate Judge advised plaintiff that it appeared from the face of the Complaint that the statute
5 of limitations may not be met in this case. (See June 8, 2010, Order to Show Cause, at p. 3). As
6 plaintiff was advised in the Order to Show Cause, federal civil rights claims are subject to the
7 forum state's statute of limitations applicable to personal injury claims. Wilson v. Garcia, 471 U.S.
8 261, 279-80, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985); Owens v. Okure, 488 U.S. 235, 249, 109
9 S. Ct. 573, 102 L. Ed. 2d 594 (1989). Federal civil rights claims arising in California after Wilson
10 are subject to the one-year limitations period set forth in Cal. Civ. Proc. Code § 340(3). See
11 Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1135 (9th Cir. 2001) (en banc); Del
12 Percio v. Thornsley, 877 F.2d 785, 786 (9th Cir. 1989); Usher v. City of Los Angeles, 828 F.2d
13 556, 558-59 (9th Cir. 1987). However, effective January 1, 2003, California enacted a new two-
14 year statute of limitations for personal injury claims. See Cal. Civ. Proc. Code § 335.1. This
15 statute is not retroactive and applies only to claims on which the statute of limitations had not
16 already run on the effective day of the act. See Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir.
17 2004) ("an extension of a statute of limitations will not apply to claims already barred under the
18 prior statute of limitations"), cert. denied, 544 U.S. 968 (2005); see also Krupnick v. Duke Energy
19 Morro Bay, LLC, 115 Cal. App. 4th 1026, 9 Cal. Rptr. 3d 767 (Cal. App. 2 Dist. 2004) (holding that
20 the new 2-year statute of limitations did not apply retroactively to claims already barred on the
21 effective date of the act).

22 Federal law, however, determines when a claim accrues, and when the applicable
23 limitations period begins to run. See Wallace v. Kato, 127 S. Ct. 1091, 1095, 166 L. Ed. 2d 973
24 (2007); Bagley v. CMC Real Estate Corp., 923 F.2d 758, 760 (9th Cir. 1991). A cause of action
25 accrues under federal law as soon as a potential claimant either is aware or should be aware of
26 the existence and source of his or her injury. See Lee v. United States, 809 F.2d 1406, 1409-10
27 (9th Cir. 1987); Bagley, 923 F.2d at 760. Additionally, federal courts must give effect to a state's
28 tolling provisions. See Hardin v. Straub, 490 U.S. 536, 543-44, 109 S. Ct. 1998, 104 L. Ed. 2d 582

(1989); Marks v. Parra, 785 F.2d 1419, 1419-20 (9th Cir. 1986). In Elliott v. City of Union City, 25 F.3d 800 (9th Cir. 1994), the Ninth Circuit held that the statute of limitations was tolled by a plaintiff's arrest and incarceration. At the time Elliott was decided in 1994, Cal. Civ. Proc. Code § 352(a)(3) provided for the tolling of statutes of limitations for the entire period of time a plaintiff was "imprisoned on a criminal charge." The Ninth Circuit held that this tolling provision was triggered by the plaintiff's arrest and incarceration. See 25 F.3d at 802-03. Subsequent to the Elliott decision, however, the California legislature amended § 352 to delete the provision providing indefinite tolling while a claimant was continuously imprisoned. Concurrently, the legislature enacted § 352.1(a), which expressly limits such tolling to a period not to exceed two years. The revised statute became effective on January 1, 1995. Because the alleged assault upon which the Complaint is based occurred in January 2006 (Complaint, at p. 5), but the initial Complaint was not presented to the Court until March 2010, more than four years later, the Magistrate Judge advised plaintiff that it appeared that the statute of limitations in this action may have lapsed. Plaintiff was ordered to show cause why the action should not be dismissed on that basis. Plaintiff was further advised that failure to timely respond to the Order to Show Cause would result in a recommendation that the action be dismissed for failure to prosecute and follow court orders. (See June 8, 2010, Order to Show Cause, at p. 3).

Plaintiff has failed to respond to the June 8, 2010, Order to Show Cause Re Expiration of Statute of Limitations, and the time to do so has expired.

II.

DISCUSSION

It is well established that a district court has authority to dismiss a plaintiff's action because of his or her failure to prosecute or to comply with court orders. See Fed. R. Civ. P. 41(b); Link v. Wabash Railroad Co., 370 U.S. 626, 629-30, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (holding that a court's authority to dismiss for lack of prosecution is necessary to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the district courts);

1 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) (holding that a district court may dismiss
2 an action for failure to comply with any order of the court).

3 In determining whether to dismiss a case for failure to prosecute or failure to comply with
4 court orders, a district court should consider five factors: (1) the public's interest in expeditious
5 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the
6 defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the
7 availability of less drastic sanctions. See In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994) (failure
8 to prosecute); Ferdik, 963 F.2d at 1260-61 (failure to comply with court orders).

9 The first two factors -- the public's interest in expeditious resolution of litigation and the
10 Court's need to manage its docket -- weigh in favor of dismissal. Plaintiff has not responded to
11 the Magistrate Judge's Order to Show Cause why this action should not be dismissed for failure
12 to meet the applicable statute of limitations, and has not evidenced his intention to proceed with
13 this action. Plaintiff's conduct hinders the Court's ability to move this case toward disposition, and
14 indicates that plaintiff does not intend to litigate this action diligently.

15 The third factor -- prejudice to defendants -- also weighs in favor of dismissal. A rebuttable
16 presumption of prejudice to defendants arises when a plaintiff unreasonably delays prosecution
17 of an action. Eisen, 31 F.3d at 1452-53. Nothing suggests that such a presumption is
18 unwarranted in this case.

19 The fourth factor -- public policy in favor of deciding cases on their merits -- weighs against
20 dismissal. It is, however, a plaintiff's responsibility to move a case toward a disposition at a
21 reasonable pace and to avoid dilatory and evasive tactics. See Morris v. Morgan Stanley Co., 942
22 F.2d 648, 652 (9th Cir. 1991). Plaintiff has not discharged this responsibility. In these
23 circumstances, the public policy favoring resolution of disputes on the merits does not outweigh
24 plaintiff's failure to show cause why the action should not be dismissed for failure to meet the
25 applicable statute of limitations as directed by the Magistrate Judge's June 8, 2010, Order, or to
26 submit any sort of response to the Order.

27 The fifth factor -- availability of less drastic sanctions -- weighs in favor of dismissal. The
28 Magistrate Judge attempted to avoid dismissal by advising plaintiff in the June 8, 2010, Order that

1 failure to comply with that Order would result in a recommendation that the action be dismissed
2 for failure to prosecute and follow court orders.

3 Taking all of the above factors into account, dismissal for failure to prosecute is appropriate.
4 Such a dismissal, however, should not be entered unless plaintiff has been notified that dismissal
5 is imminent. See West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1523 (9th Cir.
6 1990). In this case, plaintiff was cautioned about the possibility of dismissal in the June 8, 2010,
7 Order.

8 In light of the foregoing, the Court finds that dismissal of this action is appropriate for
9 plaintiff's failure to prosecute and comply with court orders. IT IS THEREFORE ORDERED that
10 this action is **dismissed without prejudice**.

11
12 DATED: July 21, 2010



HONORABLE DEAN D. PREGERSON
UNITED STATES DISTRICT JUDGE